IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 35363

ISLAND WOODS HOMEOWNERS ASSOCIATION,	)	**2010 Unpublished Opinion No. 392**
Plaintiff-Respondent,	)	**Filed: March 24, 2010**
v.	)	**Stephen W. Kenyon, Clerk**
PHILIP P. McGIMPSEY,	)	**THIS IS AN UNPUBLISHED OPINION AND SHALL NOT BE CITED AS AUTHORITY**
Defendant-Appellant.	)	

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Patrick H. Owen, District Judge.

Order on summary judgment and orders awarding attorney fees and costs, affirmed.

Philip P. McGimpsey, Eagle, appellant pro se.

Greener Burke Shoemaker P.A.; Lisa M. McGrath, Boise, for respondent.

GRATTON, Judge

Philip P. McGimpsey ("McGimpsey") appeals from the district court's order and judgment in favor of Island Woods Homeowners Association ("IWHA"), including its awards of costs and attorney fees. We affirm.

I.
FACTS AND PROCEDURAL BACKGROUND

McGimpsey is the owner of a residence located in the Island Woods Subdivision in Eagle, Idaho. McGimpsey purchased the property as an unimproved lot in 2001. The City of Eagle issued a Certificate of Occupancy to McGimpsey on October 24, 2005. McGimpsey has occupied the residence since November 2005. The recorded Declaration of Covenants, Conditions, and Restrictions of Island Woods Subdivision No. 1 ("CC&Rs") applies to all properties located within the subdivision.

In a letter dated September 5, 2006, IWHA notified McGimpsey that he had not completed his landscaping as required by the CC&Rs. The letter requested that McGimpsey comply within ten days by submitting a landscaping plan to the Architectural Control Committee ("ACC") for approval prior to commencing work on his landscaping. McGimpsey responded indicating that a landscaping plan had already been submitted and approved in 2004. He stated that his intention was to complete the landscaping upon resolution of a legal dispute with his dirt contractor. Thereafter, counsel for IWHA wrote a demand letter notifying McGimpsey that he was in violation of the CC&Rs, specifically, Article IX, Sections J and M, regarding landscaping and installation of a photosensitive pole light and mailbox, and that IWHA planned to compel compliance or seek damages for non-compliance. McGimpsey did not respond. Counsel for IWHA sent a second demand letter, again citing violations of the CC&Rs and requesting documentation of landscaping plans. McGimpsey responded claiming that he was in complete and full compliance with the CC&Rs due to a "waiver" provision, Article XI, Section 9, titled "Construction and Sales Period Exception."

IWHA filed a complaint alleging that McGimpsey had breached the CC&Rs with respect to landscaping and installation of a photosensitive pole light and mailbox. McGimpsey answered and denied any breach of the CC&Rs based upon the exception in Article XI, Section 9. IWHA filed a motion for summary judgment. The district court issued a memorandum decision and order, from which McGimpsey appeals, concluding that IWHA was entitled to summary judgment because McGimpsey had failed to complete the required landscaping set forth in Article IX, Section J, and that the exception contained in Article XI, Section 9 did not apply. The court ordered McGimpsey to comply immediately with the landscaping provision. The court also determined, however, that IWHA was not entitled to summary judgment for McGimpsey's alleged failure to install a mailbox as required by Article IX, Section M.[1] Subsequently, the court heard oral argument on McGimpsey's motion to alter or amend, which the court treated as a motion to reconsider, as well as IWHA's request for attorney fees and costs. The court issued a memorandum decision and order denying McGimpsey's motion to reconsider and granting attorney fees and costs to IWHA.

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[1] A mailbox which complies with the CC&Rs was installed during the litigation, thus rendering this component of IWHA's claims moot.

A judgment was entered on May 28, 2008, based upon the court's April 22, 2008, order, in favor of IWHA in the amount of $16,354.20, plus interest. On June 2, 2008, McGimpsey filed a notice of appeal seeking review of the summary judgment decision as well as the award of attorney fees and costs. Thereafter, the district court denied McGimpsey's second motion to alter or amend the judgment and entered a supplemental award of attorney fees for the litigation during the time period subsequent to the initial award of fees. McGimpsey filed a second amended notice of appeal on September 10, 2008, seeking relief from the district court's April 22, 2008, order denying his motion for reconsideration and awarding costs and attorney fees, the judgment entered upon that order on May 28, 2008, and the court's August 25, 2008, order granting supplemental costs and fees.

II.
ANALYSIS

When reviewing an order for summary judgment, the standard of review for an appellate court is the same standard used by the district court ruling on the motion. *Best Hill Coalition v. Halko, LLC*, 144 Idaho 813, 816, 172 P.3d 1088, 1091 (2007). Summary judgment is proper when "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Idaho Rule of Civil Procedure 56(c). If there is no genuine issue of material fact, only a question of law remains, over which we exercise free review. *Watson v. Weick*, 141 Idaho 500, 504, 112 P.3d 788, 792 (2005). "All disputed facts are to be construed liberally in favor of the non-moving party, and all reasonable inferences that can be drawn from the record are to be drawn in favor of the non-moving party." *Sprinkler Irrigation Co. v. John Deere Insurance Co., Inc.*, 139 Idaho 691, 695-96, 85 P.3d 667, 671-72 (2004). "Where the evidentiary facts are undisputed and the trial court will be the trier of fact, 'summary judgment is appropriate, despite the possibility of conflicting inferences because the court alone will be responsible for resolving the conflict between those inferences.'" *Pinehaven Planning Board v. Brooks*, 138 Idaho 826, 828, 70 P.3d 664, 666 (2003) (quoting *Aberdeen-Springfield Canal Co. v. Peiper*, 133 Idaho 82, 86, 982 P.2d 917, 921 (1999)).

A. Interpretation of CC&Rs

Idaho recognizes the validity of covenants that restrict the use of private property. *Pinehaven Planning Board*, 138 Idaho at 829, 70 P.3d at 667. When interpreting restrictive

covenants, the court generally applies the rules of contract construction. *Id.* In applying the rules of contract construction, the court must first determine whether or not the covenants are ambiguous. *Id.* A covenant is ambiguous when it is capable of more than one reasonable interpretation on a given issue. *Id.* (citing *Post v. Murphy*, 125 Idaho 473, 475, 873 P.2d 118, 120 (1994)). Ambiguity is a question of law over which this Court exercises free review. *Brown v. Perkins*, 129 Idaho 189, 192, 923 P.2d 434, 437 (1996). In order to determine whether or not a covenant is ambiguous, the court must view the agreement as a whole. *Id.* at 193, 923 P.2d at 438. If a covenant is unambiguous, then the court must apply it as a matter of law. *City of Chubbuck v. City of Pocatello*, 127 Idaho 198, 201, 899 P.2d 411, 414 (1995). Where there is no ambiguity, there is no room for construction; the plain meaning governs. If, however, a covenant is ambiguous, its interpretation is a question of fact. *Pinehaven Planning Board*, 138 Idaho at 829, 70 P.3d at 667. Thus, where a covenant is ambiguous, summary judgment would be improper. *Best Hill Coalition*, 144 Idaho at 817, 172 P.3d at 1092.

McGimpsey contends on appeal that the district court incorrectly interpreted and applied Article IX, Section J (landscaping) and Article XI, Section 9 (course of construction exception) of the CC&Rs. The court held that the provisions are clear and unambiguous. We agree.[2]

Article IX, Section J provides:

> Landscaping: Within thirty (30) days after occupancy of the Dwelling Unit located thereon, each Lot shall have rolled (sod) lawns, fully automatic underground sprinklers, two (2) deciduous trees at least two and one half inches (2 1/2") in diameter, three (3) conifer trees at least six (6) feet tall and twenty (20) shrubs or bushes as approved by the Architectural Control Committee. A landscape plan shall be submitted to and approved by the Architectural Control Committee prior to commencement of any landscaping work. During construction of the Dwelling Unit, there shall be installed in the front yard within ten feet (10') of the front boundary line, a photosensitive pole light designed to switch on automatically at sunset and off at sunrise with a minimum bulb power of 60 watts.

The district court determined that the undisputed evidence demonstrated that McGimpsey had occupied his residence beginning in November 2005 and that he had failed to complete the required landscaping within thirty days. As the court noted, McGimpsey does not question the

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[2] McGimpsey argued below that Section 9, and specifically the phrases "course of construction" and "initial sales period," was ambiguous. He does not argue any ambiguity on appeal.

existence or validity of the CC&Rs. Rather, he contends that Article XI, Section 9, operates to excuse compliance with the thirty-day requirement of Article IX, Section J.

Article XI, Section 9 states, in relevant part:

> Construction and Sales Period Exception: During the course of construction of any permitted structures or improvements and during the initial sales period, the restrictions (including sign restrictions) contained in this Declaration or in any Supplemental Declaration shall be deemed waived to the extent necessary to permit such construction and the sale of all Dwelling Units; provided that, during the course of such construction and sales, nothing shall be done which will result in a violation of these restrictions upon completion of construction and sale.

The district court concluded that the exception in Section 9 did not apply, reasoning:

> The exception created for the course of construction and the initial sales period does not apply once a dwelling unit is occupied. Thus, an owner/builder can postpone the landscaping requirements until the dwelling unit is occupied. This would prevent a situation where construction activities could damage landscaping. However, the postponement ends once the residence becomes occupied. Similarly, a builder could postpone landscaping until the residence was complete and sold, permitting the buyer to have greater input into the final landscaping scheme. In either case, the waiver provided for in Article XI, Section 9, ends once the dwelling unit is occupied. Once occupied, the owner is obligated to complete the minimum landscaping improvements called for in Article IX, Section J, within thirty (30) days.

Section 9 applies to dwelling units and the restrictions applicable to them are waived "[d]uring the course of construction of any permitted structures or improvements . . . *to the extent necessary to permit such construction and the sale of all Dwelling Units*." (Emphasis added.) Section J provides that "[w]ithin thirty (30) days after occupancy of the Dwelling Unit" specific landscaping requirements must be met. The district court correctly determined that by the unambiguous language of these provisions Section 9 is inapplicable after occupancy since it is not necessary to permit construction or sale of the residence. McGimpsey was required to complete landscaping, per Section J, within thirty days of occupancy.

McGimpsey contends, however, that because he submitted two landscaping plans, which were approved with no conditions or time limitations, he complied with the CC&Rs as "Section 9 arguably allows a factually based timeframe for completion" after a landscaping plan is approved and that IWHA falsely alleged in the complaint that landscaping plans had not been submitted. This argument was first raised in McGimpsey's motion to reconsider which the

district court refused, in its discretion, to consider, citing *Commercial Ventures, Inc. v. Rex M. and Lynn Lea Family Trust*, 145 Idaho 208, 177 P.3d 955 (2008). The district court was within its discretion to refuse to consider newly raised arguments on the motion to reconsider and McGimpsey has not urged, on appeal, any basis upon which to find an abuse of such discretion. Moreover, even assuming that McGimpsey had sufficiently raised the issue, his argument is without merit. While prior submission and approval of landscaping plans was required, that requirement did not bear upon the applicability of Section 9 or the time frame for completion of landscaping.

The district court's determination that Section 9 was inapplicable upon occupancy, that McGimpsey had thirty days from occupancy to complete landscaping per Section J, that McGimpsey failed to do so and the district court's order of specific performance are affirmed.

B. Order Regarding Costs and Attorney Fees

The district court awarded attorney fees to IWHA under I.C. § 12-121. An award under I.C. § 12-121 may only be granted "when [the court] finds, from the facts presented to it, that the case was brought, pursued or defended frivolously, unreasonably or without foundation." Idaho Rule of Civil Procedure 54(e)(1). The district court correctly stated that "the characterization of a defense as frivolous, unreasonable, or without foundation should be reserved for only exceptional cases, ones in which the record of such conduct is so clear as to eliminate any possibility of error." Determining that this was such a case, the court reviewed the facts supporting its conclusion:

> McGimpsey purchased and developed his residence in a neighborhood that had a comprehensive set of CC&Rs. He moved into the residence by November 2005. By the next Fall, McGimpsey had done little or nothing to complete his landscaping. There was no grass, no bushes, no sprinkler system, no trees, and no lighting. The yard area consisted of dirt and rocks surrounded by concrete. In September 2006, after McGimpsey had been in the house for almost a year, he was contacted by his homeowners association and notified that he had not completed his landscaping improvements as required by the CC&Rs. In response, McGimpsey implicitly acknowledged his responsibility to complete landscaping by indicating he would have it completed after he resolved some dispute with a landscaping contractor. He did nothing else. On September 29 and October 20, 2006, McGimpsey was contacted again, this time by counsel for IWHA. In response, McGimpsey asserted for the first time that he did not have any obligation to complete landscaping pursuant to the exemption for construction and initial sales.

> IWHA filed this action in November 2006 and filed for summary judgment in July 2007. It appears that McGimpsey had done nothing else on the landscaping by December 12, 2006. (*See* the photographs attached as Exhibit A to the July 9, 2007, Affidavit of Fredric V. Shoemaker.) McGimpsey never contested that these photographs accurately depicted the state of his landscaping at the time that IWHA moved for summary judgment on July 9, 2007. On September 20, 2007, at oral argument on the motion for summary judgment, McGimpsey stated in his argument that landscaping had begun in earnest on July 5, 2007. However, McGimpsey did not supply any photographs or supporting affidavits to this effect.
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> In its earlier decision the Court found that McGimpsey's interpretation of the exemption was unreasonable. Having reviewed the entire file in this matter, the Court is of the same opinion today. McGimpsey's interpretation of the scope of the exemption is so unreasonable, given the language of the CC&Rs and McGimpsey's own prior written acknowledgement of his duty to complete his landscaping, that the Court is constrained to find that McGimpsey's defense in this case was unreasonable and without foundation. As an exercise of discretion, the Court will award fees to IWHA as the prevailing party pursuant to Idaho Code § 12-121.

The court's findings are supported by the record.

McGimpsey argues that, under *Magic Valley Radiology Associates, P.A. v. Professional Business Services, Inc.*, 119 Idaho 558, 808 P.2d 1303 (1991), where there are multiple claims and multiple defenses, it is not appropriate to segregate those claims or defenses for the purpose of awarding attorney fees under I.C. § 12-121. However, that is not what happened here. Instead, McGimpsey based his defense upon Section 9, which, as the district court determined, was unreasonable and without foundation.[3] The district court, as McGimpsey claims it should, reviewed his defense of the suit as a whole, rather than focusing on individual components of the litigation. *See Walker v. Boozer*, 140 Idaho 451, 457, 95 P.3d 69, 75 (2004). The district court did not determine, based upon a single motion or a handful of motions, that McGimpsey's defense was frivolous and unreasonable, but rather focused on his total defense of the entire case. McGimpsey clearly violated the CC&Rs and his reliance upon the exception is wholly misplaced. Reliance upon the exception was McGimpsey's entire defense, which the district court correctly determined was unreasonable and without foundation.

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[3] Contrary to McGimpsey's argument, he did not prevail on the mailbox claim; the court simply declined to grant summary judgment for IWHA, reserving that claim for trial. Later, the claim became moot when a complying mailbox was installed.

McGimpsey further asserts that the district court erred in concluding that IWHA was the prevailing party. The determination of whether a party to an action is a prevailing party is committed to the sound discretion of the district court and will not be disturbed absent an abuse of that discretion. *Shore v. Peterson*, 146 Idaho 903, 915, 204 P.3d 1114, 1126 (2009). When examining whether a trial court abused its discretion, this Court considers whether the trial court: (1) perceived the issue as one of discretion; (2) acted within the outer boundaries of this discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) reached its decision by an exercise of reason. *Id.* In determining which party to an action is a prevailing party and entitled to costs, the trial court shall in its sound discretion consider the final judgment or result of the action in relation to the relief sought by the respective parties. I.R.C.P. 54(d)(1). *Daisy Manufacturing Co., Inc. v. Paintball Sports, Inc.*, 134 Idaho 259, 262, 999 P.2d 914, 917 (Ct. App. 2000).

The district court, citing *Daisy Manufacturing Co.*, stated:

> In its motion for summary judgment IWHA presented two claims: the main claim had to do with landscaping, and a minor claim having to do with the mailbox. In response, McGimpsey presented only one defense: the applicability of the exemption contained in Article XI, Section 9. IWHA prevailed entirely on its main claim and upon McGimpsey's defense. IWHA did not prevail on the minor claim, the mailbox. Considering the above [Rule 54(d)(1)(B)] factors, in its discretion, the Court finds that IWHA is the prevailing party. . . .

McGimpsey continues to claim that since IWHA did not obtain affirmative relief on all issues presented, principally on the mailbox issue, the district court erred in determining that IWHA was the prevailing party. The district court properly weighed the Rule 54(d)(1)(B) factors and found that IWHA prevailed on the crux of the lawsuit and, pointedly, McGimpsey's baseless defense under Section 9. In making its determination, the court acknowledged its discretion, acted within the outer boundaries of its discretion, and reached its decision by an exercise of reason.

McGimpsey also challenges the amount of attorney fees and costs awarded by the district court.[4] "The calculation of reasonable attorney fees is within the discretion of the trial court."

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[4] Other than general comments that the district court did not award costs in a fair and equitable manner and criticism of the court's decision that IWHA is the prevailing party, McGimpsey does not specifically present any argument or authority regarding the district court's granting costs as a matter of right or discretionary costs. A party waives an issue on appeal if

Lettunich v. Lettunich, 145 Idaho 746, 749, 185 P.3d 258, 261 (2008) (quoting *Bott v. Idaho State Building Authority*, 128 Idaho 580, 592, 917 P.2d 737, 749 (1996)). "The burden is on the party opposing the award to demonstrate that the district court abused its discretion." *Lettunich*, 145 Idaho at 749, 185 P.3d at 261 (quoting *Eastern Idaho Agricultural Credit Association v. Neibaur*, 133 Idaho 402, 412, 987 P.2d 314, 324 (1999)). When reviewing the question of whether the district court abused its discretion, we employ the same three-tiered analysis discussed above. *See id.*

In determining the amount to award for attorney fees, the district court recognized that it must consider the factors set forth in I.R.C.P. 54(e)(3). "Rule 54(e)(3) does not require the district court to make specific findings in the record, only to consider the stated factors in determining the amount of the fees. When considering the factors, courts need not demonstrate how they employed any of those factors in reaching an award amount." *Lettunich*, 145 Idaho at 750, 185 P.3d at 262 (quoting *Smith v. Mitton*, 140 Idaho 893, 902, 104 P.3d 367, 376 (2004)).

McGimpsey argues that the overall fee award is excessive, and, in particular, that fees for pre-filing legal work, late-filed pleadings and preparation and prosecution of the fee request itself should not have been awarded. In addition, McGimpsey contends that the district court's ten percent reduction of the overall fee request was arbitrary.

As to the overall fee request, the district court reviewed the request "in detail." The court determined that the billings related to the work of the two attorneys were reasonable. The court stated:

> This is a reasonably straightforward civil dispute involving the meaning and effect of a subdivision's covenants. IWHA tried and failed to get McGimpsey to comply short of litigation. The activities reflected in the fee request seem reasonable given the nature of the case. The Court finds that all of the billings related to the work of Mr. Shoemaker and Ms. Vaughn are reasonable.

The court refused to award fees for work performed by the paralegal or the case assistant. As the district court noted, the main claim in the case had to do with the landscaping provision in the CC&Rs and McGimpsey's defense of the Section 9 exception. Nearly all of the litigation in this

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either argument or authority is lacking. *Powell v. Sellers*, 130 Idaho 122, 128, 937 P.2d 434, 440 (Ct. App. 1997). Furthermore, the decision of whether to award costs is discretionary with the trial court and McGimpsey has failed to demonstrate that the court abused that discretion.

case involved that dispute. McGimpsey's repeated efforts to excuse compliance with the landscaping provision through the Section 9 exception increased the amount of time IWHA's attorneys had to spend in bringing the matter to a conclusion. *See Lettunich*, 145 Idaho at 751, 185 P.3d at 263. The court did not abuse its discretion in concluding that the fees requested by the two attorneys were reasonable.

In response to McGimpsey's contention that the fee award should be reduced because IWHA did not obtain affirmative relief on the mailbox issue, the district court reduced the overall award by ten percent. McGimpsey claims that the ten percent reduction is arbitrary and could not have been derived from a segregation of individual time entries as the billing entries did not separately identify work on the individual issues. McGimpsey provides this Court with no facts with which to determine that ten percent was unreasonable or any alternative itself based upon facts. "The bottom line in an award of attorney fees is reasonableness." *Lettunich*, 145 Idaho at 750, 185 P.3d at 262. While the court must consider all of the factors listed in Rule 54(e)(3), it is not required to make specific findings on the record. *Id.* at 749-50, 185 P.3d at 261-62. The court must have sufficient information in order to consider the requisite factors. While some information must come from the party requesting an award, "some of the information may come from the court's own knowledge and experience." *Id.* at 751, 185 P.3d at 263 (citing *Sun Valley Potato Growers, Inc. v. Texas Refinery Corp.*, 139 Idaho 761, 769, 86 P.3d 475, 483 (2004)). Here, the court made a reasoned and reasonable determination, from the issues presented and the record, that the mailbox issue comprised a small part of the litigation and approximated ten percent.

Regarding the pre-filing work, general progression of the litigation and the fee request, the district court reviewed the record and efforts of IWHA's counsel, stating:

> The case involved file review, drafting and filing of the complaint, reviewing the answer, attending to court scheduling, preparation, service and review of various discovery matters, research, drafting, filing, review and argument on the pleadings associated with the motion for summary judgment, and preparation of the memorandum of costs and fees.

McGimpsey fails to point to pre-filing legal fees, other than the review and drafting identified by the court, which should not have been awarded. Fees for analysis and preparation of the complaint for filing are appropriately awarded. In addition, attorney fees for preparation and prosecution of the attorney fee request, to which McGimpsey objected and a hearing was held,

are appropriately awarded. He argues that the $2,750 fee claim associated with the preparation and prosecution of the fee request was "eye-popping," but McGimpsey provides this Court with no facts or citation to the record to support his contention that such a sum was requested or awarded for presentation of the fee requests. A general attack on the findings and conclusions of the district court, without special reference to evidentiary or legal errors, is insufficient to preserve an issue. The Court will not search the record on appeal for error, *Bach v. Bagley*, ___ Idaho ___, ___ P.3d ___ (2010). Finally, with respect to the claim that fees should not have been awarded for late-filed briefs, McGimpsey repeatedly objected to and litigated motions to strike what he contended were untimely filings by IWHA. However, he obtained no relief on these objections from the district court and the pleadings were neither stricken nor ignored by the district court. It was McGimpsey's failed efforts to litigate the timeliness of pleadings filed with the court which increased the overall fees incurred in the case, and his contention that the court should have refused to award fees to IWHA for the contested pleadings is wholly without merit.

The district court possessed sufficient information from which it could determine whether the fee request was reasonable. McGimpsey has failed to demonstrate that the district court abused its discretion in its award of attorney fees and costs.

McGimpsey also appeals from the district court's order granting supplemental costs and attorney fees. McGimpsey's only contention is that since the district court reduced the initial award by ten percent it should have been "somewhat consistent" with the initial award such that he should have received at least a similar discount relative to the supplemental award. McGimpsey's argument is without merit. The initial fee award was reduced, in the court's discretion, for work performed on the mailbox issue. The supplemental fee award was based upon IWHA's work performed subsequent to arguing the case through summary judgment. Different work was performed post-summary judgment, much of which was based upon the fact that McGimpsey continued to file a number of motions. The district court did not abuse its discretion in awarding supplemental costs and attorney fees.

C. Idaho Appellate Rule 13

McGimpsey filed a notice of appeal on June 2, 2008. IWHA filed its supplemental request for attorney fees and costs on June 4, 2008. A hearing was held on July 10, 2008. The district court granted the request on August 25, 2008. McGimpsey claims that the district court erred "by allowing Plaintiff to initiate post-appeal proceedings in violation of I.A.R. Rule 13(a)'s

fourteen day automatic stay." We disagree. The court had authority to "[m]ake any order regarding the taxing of costs or determination of attorneys fees incurred in the trial of the action." I.A.R. 13(b)(9). Even if Rule 13(a) were read to preclude filing any documents in the district court during the fourteen-day stay, McGimpsey has failed to demonstrate any prejudice or right to relief since no action was taken on the request for supplemental fees and costs until well after the automatic stay period lapsed.

D. Right to Negotiate Waiver

McGimpsey contends that the district court erred by "allowing Plaintiff's counsel to unilaterally abridge and deny the parties their I.A.R. Rule 16(b) right to negotiate a waiver of an appeal supersedeas bond." It is unclear from the briefing whether McGimpsey also claims that the district court erred in denying his motion to quash the writs of execution.[5] In any event, all of McGimpsey's arguments are based upon an assertion that IWHA's counsel acted without authority, preempting an opportunity to negotiate the waiver of a supersedeas bond. This claim is without merit and will not be further addressed.[6]

E. Costs and Attorney Fees on Appeal

IWHA requests costs and attorney fees on appeal pursuant to I.C. § 12-121. An award of attorney fees may be granted under I.C. § 12-121 and I.A.R. 41 to the prevailing party and such an award is appropriate when the court is left with the abiding belief that the appeal has been brought or defended frivolously, unreasonably, or without foundation. *Rendon v. Paskett*, 126 Idaho 944, 945, 894 P.2d 775, 776 (Ct. App. 1995). IWHA is the prevailing party on appeal, and we conclude that McGimpsey's appeal has been brought frivolously, unreasonably, and without foundation.

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[5] The motion to quash is not listed as an issue on appeal and the court's order is not included in our record and, thus, the claim will not be considered. *Powell v. Sellers*, 130 Idaho 122, 127, 937 P.2d 434, 439 (Ct. App. 1997).

[6] There is no indication in our record that the court ruled on any objection regarding the supersedeas bond and we will not further consider the issue. *Sanchez v. Arave*, 120 Idaho 321, 322, 815 P.2d 1061, 1062 (1991).

III.

CONCLUSION

The district court's summary judgment order is affirmed. The district court's orders awarding costs and attorney fees are affirmed. Costs and attorney fees are awarded to IWHA on appeal.

Chief Judge LANSING and Judge MELANSON, **CONCUR.**